IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 178

ILLINOIS COMMERCE COMMISSION, JOHN D. BIGGS, WILLIAM PARRILLO, et al.,

Appellants,

vs.

CHARLES M. THOMSON, AS TRUSTEE OF THE PROPERTY OF CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Appellee.

REPLY OF APPELLEE TO BRIEF OF AMICUS CURIAE, CITY OF NEW YORK.

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Foreword.

Although the brief of the City of New York, as *amicus curiae*, goes considerably outside the record, and attempts to bring into this case matters involved in a New York dispute in which *amicus curiae* is interested, appellee deems it advisable, even in the short time now remaining, to call the Court's attention to some of the errors and fallacies upon which *amicus curiae's* position rests.

I.

The 1925 Section 13 order related intrastate and interstate commutation fares and was still in effect in 1942, unchanged by the intervening 1936 order.

The brief which the City of New York filed as *amicus curiae* in this proceeding, dated January 5, 1943, is based on an underlying fallacy. It assumes that the 1925 Section 13 order of the Interstate Commerce Commission, applicable to the North Western, was one relating Illinois intrastate *commutation* fares to interstate *single ride* fares. See pages 12, 13, 25, 26, and 27 of the *amicus curiae* brief. In fact, the relationship established by the 1925 order was one between Illinois intrastate *commutation* fares and interstate *commutation* fares in the same territory and had nothing to do with the 3.6¢ basic one-way single-ride passenger fares. The North Western's Illinois-Wisconsin interstate commutation fares and its Illinois intrastate commutation fares were on the same level prior to 1920, and together were maintained on a common basis unrelated to the one-way fares (R. 21-2, 26). The latter were on "a materially higher basis" (R. 29). In 1920 the Interstate Commerce Commission ordered a 20% increase in the interstate commutation fares. This was put into effect and left a precipitous rise at the state line (R. 22, 23) and resulted in the low intrastate commutation fares being used to defeat the higher interstate fares (R. 29, 30) by combinations on the stations closest to the Wisconsin-Illinois state line. The 1925 order of the Interstate Commerce Commission corrected this situation and established a continuing and non-discriminatory relationship between the state and interstate *commutation* fares.

Amicus curiae, having erroneously assumed the existence of a relationship between intrastate *commutation* fares and interstate single-ride fares (in other words, a relationship between apples and pears), proceeds to the wholly mis-

taken assumption that the 1936 order of the Interstate Commerce Commission in Docket 26550, lowering the basis for *single ride* fares, in some way changed or destroyed the relationship between interstate and intrastate commutation fares established and maintained by virtue of the 1925 order. In truth, there was absolutely no change made by the 1936 order as to either the level or the relationship of the interstate and intrastate *commutation* fares, but, as the record shows (R. 7) and the lower court found (R. 51), those fares and the relationship continued untouched by the 1936 order.[1] In that order the Interstate Commerce Commission was careful to preserve the continuing effect of the Section 13 relationship that it had established and over which it had jurisdiction, including this relationship of Illinois intrastate commutation fares and interstate commutation fares, by a specific statement that such Section 13 orders affecting intrastate passenger fares or charges were modified "to the extent only that may be necessary to permit the bases of fares and charges herein prescribed or authorized to become effective or to continue in effect, as the case may be."[2] It is evident, therefore, that the position of *amicus curiae*, to the effect that the 1936 order of the Interstate Commerce Commission "put to death" the 1925 order of the Interstate Commerce Commission as to these Illinois intrastate passenger fares, falls of its own weight.

At page 3 of the brief of *amicus curiae*, about the middle of the page, in discussing the 1936 order of the Interstate Commerce Commission, the statement is made that this order terminated certain Section 13 orders and that "among

[1] This result obtained because these commutation fares were already maintained "subject to a maximum of 2 cents per mile" (R. 31), the same maximum prescribed in the 1936 order.

[2] The prescribed level of other fares (single ride) covered by other orders in the same docket number as the 1925 order (11703) was reduced by the 1936 order. This explains the modifying reference to docket 11703, even though the commutation fares in the same docket number were left untouched.

the orders so discharged was the 1925 Section 13 order in Docket No. 11703, by which the North Western's intrastate commutation fares had been correlated with the fare structure in Ex Parte 74." The fact is precisely the opposite. The 1925 Section 13 order applicable to these Illinois intrastate commutation fares was preserved in full effect, because the only changes required in any Section 13 orders were what was necessary to permit the bases of fares and charges prescribed in the 1936 case to become effective, and, because of the circumstances already noted, *no change whatever was required or made in the North Western's commutation fare structure, state or interstate.*

At page 12 of the brief of *amicus curiae* the fallacious assumption hereinbefore described is again indulged in for the purpose of relating intrastate commutation fares of the North Western to interstate fares for single-ride travel, to which they were not intended to be related at all. The basic relationship of interstate and intrastate commutation fares, maintained for many years until disrupted in 1920 but restored in 1925 *and continued ever since*, is completely ignored. *Amicus curiae* then follows with the remainder of page 12 and page 13 of its brief by working out some percentage relationships between the apples and pears, thus sought to be compared. *Amicus curiae* persists in ignoring the real and fundamental relationship, which is between commutation fares, state and interstate, neither of which bears any established relationship to the single-ride fares.

At page 25 *amicus curiae* falls into the same error. Again the assertion is made that the 1925 order "was six years dead" and that the North Western was attempting to breathe new life into the order. Since that order, continued in effect through the 1936 proceeding, and the rates here involved and those to which they were related (the inter-

state commutation fares) were untouched and unchanged by the 1936 order, and the Commission was very particular to limit its changes of Section 13 orders to what were necessary to permit the prescribed levels of single-ride fares, it is clear beyond argument that the 1925 order was in full and reasserted vigor at the time the 1942 order was made. The same observations may be made about a similar statement of *amicus curiae* on pages 26 and 27 of its brief.

II.

The recital in the 1942 order that applications would be made to state authorities is completely accounted for by the fact that in many states no Section 13 jurisdiction had ever been exercised by the Interstate Commerce Commission.

Amicus curiae also persists in the error into which its argument led the New York court in the *Transit Commission Case*, 33 N. Y. S. (2) 993, already thoroughly discussed in the briefs heretofore filed. *Amicus curiae* lays great stress on the recital in the 1942 order of the Interstate Commerce Commission that "similar application has been or will be made to the regulatory authority of the respective states for permission to increase similarly petitioner's intrastate rates, fares and charges." This recital was due to the fact that in many states no Section 13 action of the Interstate Commerce Commission ever has been necessary to put rates and fares on the interstate level. Unless, therefore, there was, as here, an outstanding and continuing Section 13 order, the Interstate Commerce Commission would not have had authority to raise the intrastate rates and fares, and petitions to state authorities were necessary. A realization of this fact will answer what is said in the brief of *amicus curiae* at the bottom of page 3 and on pages 15, 17, 21, and 24 (see appellee's brief, 34-5).

III.

Amicus Curiae's argument would hamstring the Interstate Commerce Commission's efforts to preserve a non-discriminatory relationship already lawfully established by it.

What *amicus curiae's* argument would produce, if adopted, would be a hamstringing of the Interstate Commerce Commission's power, heretofore exercised and now continuing, to raise and lower together in an orderly way related parts of a rate structure which that Commission has found it necessary to establish and maintain in order to prevent prejudice and discrimination against interstate commerce and persons and localities therein and preference of intrastate commerce and persons and localities in intrastate commerce. As the record shows, it took five years (1920-1925) to get the unlawful and prejudicial relationship between Illinois intrastate commutation fares and the interstate commutation fares corrected. *Amicus curiae* would destroy the efficient working of the Interstate Commerce Commission in retaining non-prejudicial relationships once established. The Interstate Commerce Commission's sensible and practical method is that where it has once made the necessary jurisdictional findings, as it did in the 1925 order, and established the relationship, it continues the order and the relationship in effect, and when a change is made through a general-revenue proceeding in the level of the interstate rates, it amends its outstanding orders fixing the related intrastate rates to the extent necessary (and only to that exent) to preserve the non-discriminatory and non-prejudicial relationship. If *amicus curiae's* views prevail there will be recreated the very type of discrimination already removed, because it is manifest to anybody that when a change is made in an interstate level, without at the same time changing the intrastate

level *over which a continuing jurisdiction already exists*, the Commission, the carriers, and the public are confronted all over again with the pre-existing prejudicial and discriminatory situation. No such inefficient method is required by Section 13 of the Interstate Commerce Act. The Commission's jurisdiction is a continuing one, and once asserted and continued, need not be hamstrung by prohibiting, to the detriment of interstate commerce, the amending (in the general-revenue case) of its orders applicable to existing Section 13 situations and the necessity for years of additional hearings investigating facts previously investigated and fully established.

The "dovetail" relationship existing between Sections 13 and 15a of the Interstate Commerce Act has already been commented upon in the briefs heretofore filed, and that relationship is admitted by *amicus curiae*. Ex Parte 148 was an attempt by the carriers, with the approval of the Interstate Commerce Commission, to raise the whole level of passenger fares to whatever extent the Interstate Commerce Commission had jurisdiction. That jurisdiction extended to all interstate fares and such intrastate fares as the Commission had had occasion to take over by virtue of Section 13 orders still outstanding. By its order in Ex Parte 148, applicable to passenger fares, the Commission exercised all the jurisdiction it had, and, instead of rewriting every individual Section 13 order it adopted the sensible course of decreeing that all those outstanding orders would be deemed amended only to the extent necessary to permit the 10% increase and that a copy of the amending order would be filed in the docket of each such Section 13 proceeding. In this expeditious manner the Commission in effect accomplished the same thing that it would have done if it had laboriously gotten out each existing Section 13 order and rewritten it by inserting the 10% higher requirement than that which had been put in originally. Its elec-

tion to accomplish the amendment in the manner that it did is nothing more than an efficient way of dispensing with a lot of unnecessary clerical work. The effect is to reaffirm and continue the original findings, save as altered by the addition of the same percentage to the intrastate as to the interstate fares, thereby preserving the relationship.

Considering the necessity for administrative tribunals functioning expeditiously in time of war, this case assumes an unusual importance. Here is an increase which the Interstate Commerce Commission has found is necessary to enable the railroads to render adequate and efficient railway transportation service during the present emergency. To put it into effect quickly, as the necessities of the situation demanded, the Commission entered a sweeping order of amendment to all outstanding orders (as *amicus curiae* admits; see top of page 23 of its brief), and thus left only for state action the residue of intrastate fares over which the Interstate Commerce Commission had not taken Section 13 jurisdiction. It will be remembered that in order to be in a position to exercise its broadest jurisdiction, the Interstate Commerce Commission had given notices to the states, as required by Section 13. Thus no jurisdictional impediment existed to the complete exercise by the Commission of its full powers. There is no reason why the notice thus given to the states in Ex Parte 148, being what the statute requires, should not be considered sufficient as part of a program to modify all outstanding orders of the Interstate Commerce Commission to the extent necessary to permit the increase so far as that Commission had jurisdiction. Such was the intent of the petition and the resulting order.

The notices to the states were not limited to a request for voluntary cooperation, as *amicus curiae* contends on pages 17 and 18 of its brief. At page 18 it quotes a recital from the report of the Commission that the cooperation of the

state commissions was sought, but omits to point out that the order of the Commission recites "that the proper authorities of all states have been notified of this proceeding" (R. 32), a complete compliance with the notification requirement of paragraph 3 of Section 13. Furthermore, the notification requirement of that section pertains to proceedings where there is brought in issue a fare "made or imposed by authority of any state." Since 1925 the Illinois intrastate commutation fares here involved have been maintained, not by any authority of the State of Illinois, but by a continuing order of the Interstate Commerce Commission. Granting that a notice to the state was necessary in the proceeding which led to the 1925 order, it is questionable whether any such notice was required in Ex Parte 148 in order to permit raising the level of the intrastate commutation fares to conform to that of the interstate commutation fares being raised at the same time. However, a notice was given, which, in any event, completely satisfies the requirement.

If *amicus curiae's* contention is sound, then each general revenue order (permitting a general increase or decrease in rates and fares) would automatically recreate and revive all Section 13 discriminatory situations previously corrected by the Interstate Commerce Commission. Further than this, it would automatically require re-trial of all discrimination cases under Section 3 of the Act involving the Commission's findings and orders previously made in hundreds of special, local and group rate structures. These same arguments of *amicus curiae* would make all such orders *functus officio* too. As the courts well know, the rates held and maintained by virtue of outstanding orders (under provisions of the Act other than Section 13) are numerous and cover large segments of the whole national rate structure. Giving effect to the contention of *amicus curiae*

would accomplish an almost complete frustration of the very purpose for which the Commission entered the 1942 order, and would produce the "administrative paralysis" referred to by Mr. Justice Brandeis in a footnote in the *New England Divisions Case*, 261 U. S. 184, at p. 198.

The Commission's reference, in Ex Parte 148, to the case of *Arizona Grocery Company* v. *Atchison, Topeka and Santa Fe Railway Company*, 284 U. S. 370, referred to on page 20 of the brief of *amicus curiae*, is nothing more than a routine protection against the possibility of future reparation claims in individual instances that might arise. There is no mention of the word "fares" in what the Commission there says, that being the word ordinarily used as to passenger charges. Note that, on page 612 of its opinion in Ex Parte 148 (248 I.C.C. 545) the Commission speaks of "passenger fares" and of "freight rates and charges," and of both as "rates, fares and charges." The Commission simply wanted to make it clear that in any freight reparation situation, such as that involved in the *Arizona Grocery Company Case*, it did not intend by its increase in a general-revenue case to preclude any shipper from asserting that an individual rate was unreasonable for the past as well as the future. This is but corollary and consonant to the Commission's reservation of jurisdiction to determine the lawfulness of particular rates or fares established pursuant to the Ex Parte 148 order—the so-called saving-clause (Appellee's Brief, 11, footnote 5).

IV.

Amicus Curiae's cases distinguished.

Arkansas Railroad Commission v. *Chicago, Rock Island and Pacific R. R. Co.*, 274 U. S. 597, simply holds that a previous Section 13 order does not of itself increase the intrastate rates again when the interstate rates go up. In

that case there was no such second order as we have here in Ex Parte 148. The *Arkansas* case would be parallel if in Ex Parte 148 the Interstate Commerce Commission had said nothing at all about amending the 1925 Section 13 order, either specifically or in general terms.

The case of *Georgia Public Service Commission* v. *United States*, 283 U. S. 765, in so far as applicable at all, supports rather than opposes appellee's position. It involved a direct attack on a Section 13 order of the Interstate Commerce Commission, which order was sustained. When the intrastate rates were ordered raised the level ordered was that of an interstate scale which had been found reasonable 18 months before. No new finding as to the interstate rates was made at the time the intrastate rates were ordered raised to their level. In the absence of any showing of changed conditions, the court held that any objection to the procedure was unfounded. The court construed the word "contemporaneously" in the Section 13 order as referring only to the rates in force at the time of the effective date of the original order. There is no such word in the 1925 commutation fares Section 13 order which we are discussing here and no reliance therefore is placed on it, since appellee relies not only on the original order issued in 1925 but on the subsequent modifying order issued in Ex Parte 148.

In *Board of Railroad Commissioners of North Dakota* v. *Great Northern Railway Company*, 281 U. S. 412, there had been an express vacation of the North Dakota section 13 order so as to permit North Dakota to resume its control over intrastate rates. Subsequently North Dakota ordered a reduction in intrastate rates below the interstate level. Without alleging confiscation (a fact which the court emphasized in its opinion), the railroads sought to enjoin the reduction pending action on a new Section 13 petition to

the Interstate Commerce Commission. It was held that under these circumstances an injunction should not issue to restrain enforcement of the lawfully established state rates pending Interstate Commerce Commission action. Manifestly the state rates were valid until a new Section 13 order could be procured, since the old order had been expressly vacated and no rates were being held or maintained thereunder. In our case, as has already been pointed out, the 1925 order still existed in full vigor at the time the amending order in Ex Parte 148 was issued, and the fares required by the 1925 order were being "held and maintained" by virtue of that order.

Atchison, Topeka and Santa Fe Ry. Co. v. *U. S.*, 284 U. S. 248, was a case which involved the grain rate structure of the railroads in the Western District of the United States (p. 254). The proceeding was instituted in 1925 and after extended hearings the record was closed in 1928. A second petition for rehearing "in the nature of a supplemental bill" (p. 256-260) was denied by the Commission in 1931. It set up the far-reaching change in economic conditions due to the tremendous impact of the 1929 collapse which had occurred between the hearings and the final disposition and alleged that the asserted important effect thereof upon the rate structure under investigation should be taken into consideration by the reception of additional testimony. That situation bears no resemblance to that which is now before the Court. We have here a simple case of relationship between interstate commutation fares and intrastate commutation fares in the same general territory, which is an unchanging thing (as distinguished from the level of the fares), and certainly may safely be assumed not to change unless and until the contrary is shown. No change is here alleged or claimed.

Amicus curiae seems, by implication at least, to be critical of the Attorney General of Illinois for having sub-

mitted this case on the pleadings. *Amicus curiae* should realize that no question of fact exists in this case and that it is not a direct attack on the Commission's order permitting of any examination of the evidence. In that situation, and the pleadings being complete as they were, the Attorney General very properly stood on his demurrer. It is not to be assumed that the officials of the State of Illinois were unfamiliar with the facts as to the transportation situation in Chicago and adjacent territory, or that New York officials are more familiar therewith.

V.

Confiscation stands admitted on this record.

Amicus curiae, though directing its argument largely to the Section 13 situation, in which it alleges a similar interest in New York, makes mention of appellee's point on confiscation, in which, so far as the brief shows, *amicus curiae* has no interest. *Amicus curiae* evidently realizes the great danger that exists from its point of view that this Court, whatever it does with Section 13 questions, cannot overlook the fact that the fares which the Illinois Commerce Commission sought to maintain are, on the face of the record, admittedly confiscatory. No question is here presented of bearing a burden of confiscatory rates during an administrative proceeding to determine whether or not the rates are confiscatory. It is here admitted that the rates fall short of providing enough revenue to meet the expense incurred in rendering the service, afford no return whatever upon the property devoted to the service, and are confiscatory (R. 14-15, 40-42, 50, 54, 56). Hence there was no need for either Commission or Court to "determine the value of the property attributable to the traffic in question or what would constitute a reasonable return thereon." *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 424. And notwith-

standing the Illinois Commission's suspension order and proceeding, the appellee was "not bound to await final action by the Commission and * * * to serve in the meantime without just compensation." *Idem*, 417. In the situation here shown, regardless of all other considerations, this Court should continue the protection of appellee's constitutional rights, and permit the increased fares to remain effective.

CONCLUSION.

The order and decree appealed from should be affirmed.

Respectfully submitted,

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January 9, 1943.